

BOIES SCHILLER FLEXNER LLP

David Boies (admitted *pro hac vice*)
333 Main Street
Armonk, NY 10504
Tel: (914) 749-8200
dboies@bsfllp.com

Mark C. Mao, CA Bar No. 236165
Beko Reblitz-Richardson, CA Bar No. 238027
Erika Nyborg-Burch, CA Bar No. 342125
44 Montgomery St., 41st Floor
San Francisco, CA 94104
Tel.: (415) 293-6800
mmao@bsfllp.com
brichardson@bsfllp.com
enyborg-burch@bsfllp.com

James Lee (admitted *pro hac vice*)
Rossana Baeza (admitted *pro hac vice*)
100 SE 2nd St., 28th Floor
Miami, FL 33131
Tel.: (305) 539-8400
jlee@bsfllp.com
rbaeza@bsfllp.com

Alison L. Anderson, CA Bar No. 275334
725 S Figueroa St., 31st Floor
Los Angeles, CA 90017
Tel.: (213) 995-5720
alanderson@bsfllp.com

SUSMAN GODFREY L.L.P.

William C. Carmody (admitted *pro hac vice*)
Shawn J. Rabin (admitted *pro hac vice*)
Steven M. Shepard (admitted *pro hac vice*)
Alexander Frawley (admitted *pro hac vice*)
1301 Avenue of the Americas, 32nd Floor
New York, NY 10019
Tel.: (212) 336-8330
bcarmody@susmangodfrey.com
srabin@susmangodfrey.com
sshepard@susmangodfrey.com
afrawley@susmangodfrey.com

Amanda K. Bonn, CA Bar No. 270891
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Tel.: (310) 789-3100
abonn@susmangodfrey.com

MORGAN & MORGAN

John A. Yanchunis (admitted *pro hac vice*)
Ryan J. McGee (admitted *pro hac vice*)
201 N. Franklin Street, 7th Floor
Tampa, FL 33602
Tel.: (813) 223-5505
jyanchunis@forthepeople.com
rmcgee@forthepeople.com

Michael F. Ram, CA Bar No. 104805
711 Van Ness Ave, Suite 500
San Francisco, CA 94102
Tel: (415) 358-6913
mram@forthepeople.com

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,
JEREMY DAVIS, CHRISTOPHER
CASTILLO, and MONIQUE TRUJILLO
individually and on behalf of all similarly
situated,

Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' REPLY IN SUPPORT OF
THEIR SUPPLEMENTAL SANCTIONS
BRIEF PURSUANT TO DKT. 624**

Referral: The Honorable Susan van Keulen

Google admits that it initially read the Court’s Order as requiring it to investigate the existence of *other* Incognito-detection bits. 2d Supp. Sramek Decl. ¶ 7. However, Google now claims to have “reconsider[ed]” its reading of the Court’s Order in light of the Court’s order setting the briefing schedule on this motion. *Id.*; Opp. at 3. Nothing in the briefing order limited the sanctions Order—the “disputed fields” it mentioned have always been *any* Incognito-detection bits. Dkt. 588 at 6. Google could have requested an extension, sought reconsideration (or even clarification), or appealed, but Google did none of those things. It instead once again applied “Google law” and gave itself a free pass on compliance with the Court’s orders.

Mr. Sramek's declarations and a document Google recently produced raise serious questions regarding Google's deliberate and ongoing concealment of relevant discovery. On July 21, 2022, Google for the first time produced an e-mail thread showing that beginning in September

2021 a Google team including Mr. Sramek was [REDACTED]
[REDACTED]” by “[REDACTED]
[REDACTED]. Declaration of Mark Mao, Ex. B. Mr. Leung responded to the

by asking whether [REDACTED] *Id.* Mr. Sramek was copied on responses indicating (1) “[REDACTED]” and (2) [REDACTED]. *Id.* Multiple documents indicate Google had already been considering “[REDACTED]” that would track Incognito-usage, including “[REDACTED].” Mao Decl., Ex. C.¹ Did Google implement such other [REDACTED] in Google’s “proto” structure, or otherwise? Use those [REDACTED] to log Incognito? Mr. Sramek refuses to investigate, limiting his investigation only to logs in which Google uses any field to infer private browsing, and only for the three bits that Plaintiffs identified. 2d Supp. Sramek Decl. ¶¶ 6–7.

Moreover, Google’s Senior Litigation Counsel on this matter was copied on the recently-produced e-mail thread. That thread includes redacted e-mails from Messrs. Leung and Liao on November 17, 2021—one day before Google’s deficient Golueke declaration omitting dozens of logs containing the three Incognito bits disclosed so far (and possibly many more).² Dkt. 338. This calls into serious question Google’s claimed inadvertence, as opposed to deliberate concealment.

III. Google’s Misconduct Has Prejudiced Plaintiffs.

Plaintiffs’ prejudice is confirmed by Google’s opposition. Google asserts that the belatedly-identified logs are “not accretive,” relies on declarations with thin untested substance, and leaves Plaintiffs and the Court with no way to test those assertions because no schema, fields, data, or additional documents regarding such logs have been produced. Google cannot dispute that as-yet undisclosed logs are “accretive” when (1) Google’s own documents show it was considering [REDACTED] that would [REDACTED] show Incognito usage and yet (2) Google refuses to investigate the existence of such bits and logs. Mao Decl., Ex. C.

With respect to the [REDACTED] logs that Sramek’s June 14 declaration belatedly disclosed, Google’s vague description also confirms their relevance: [REDACTED] are used “to predict ad revenues,” store “data

¹ Another document refers to the fact that “Chrome has explored options that would also pass an ‘is incognito’ bit.” Mao Decl., Ex. D.

² Litigation Counsel was only copied, so the Court should review the unredacted version *in camera*.

1 regarding users interactions with ads related to third-party exchanges,” create “joined logs” that
 2 “contain information in personal logs, which were not previously disclosed by Google,” for
 3 unspecified “analysis and testing,” and for unspecified “test conditions created by Google
 4 employees.” Dkt. 614-2 ¶¶ 6-10. Google offers its un-tested say-so that *some* of the data in these
 5 logs may have existed in some other logs that Google *also* failed to timely and fully disclose. That
 6 is no answer, even if accepted. Why should Plaintiffs or the Court accept Google’s say-so when
 7 the very purpose of the improperly-withheld discovery was to *test* such assertions *with evidence*?
 8 To allow Google’s continued *ipse dixit* is to reward its misconduct. Nor does Google have a
 9 credible answer for one form of prejudice which is clear: its spoliation of data from the [REDACTED] newly-
 10 disclosed logs (let alone those logs that are still un-investigated and un-disclosed).³ Opp. 5. Google
 11 misrepresents the Court’s sanctions Order as blessing its deletion of “Incognito-detection bit” data.
 12 *Id.* Not so: the Court noted there was no “basis for a finding that Google spoliated evidence”
 13 because “Google’s counsel represented that ‘all of the logs that contained these bits at issue have
 14 been included in the Special Master’s preservation proposal.’” Dkt. 588. Google makes no such
 15 representation about *these* logs or *others* as to which it refuses to investigate.

16 Tellingly, Google no longer disputes that data flagged with an Incognito-detection bit in
 17 such logs *can* be joined with users’ “authenticated” data to identify them. Opp. 6–7. Google merely
 18 argues that its “policy” forbids such joins.⁴ Google’s failure to deny that such spoliated data *could*
 19 have been used to identify class members demonstrates prejudice and also begs the question: what
 20 *else* could Plaintiffs have done with such data and Google’s arguments opposing class
 21 certification? Quantify how frequently individual class members “interact[ed] with ads” in
 22

23 ³ As the Court is aware from the preservation dispute—and confirmed by Google’s documents—
 24 any “‘incognito bit’ [REDACTED] could be used [REDACTED]
 25 [REDACTED]” for preservation. Mao Decl., Ex. D at ‘254; Dkt. 546. Here, Mr. Sramek
 26 presumably looked within Google’s schema and proto-structure for all such bits and customizable
 27 fields, but appears to refuse to share findings.

28 ⁴ Mr. Sramek claims based entirely on inadmissible hearsay from another “Google engineer” that
 [REDACTED] such log includes both authenticated and unauthenticated data, but does not join the two
 together. 2d Supp. Sramek Decl. ¶ 10. He does not dispute that the log *can* join the two together.
 Nor does he name the Google engineer. Is it Mr. Leung, whom Google is precluded from relying
 on? Mr. Liao? Or another undisclosed witness? Either way, the Court should strike such hearsay.

1 Incognito? “[P]redict ad revenues” tied to class members? Confirm that class members did not
 2 block Google via obscure Chrome settings? Demonstrate that the full scope of how Google tracks,
 3 stores, and uses such data in a “highly offensive” way against the law? Google opposes class
 4 certification by faulting Plaintiffs for supposedly failing to do these things, all while concealing
 5 and spoliating logs that may have been used to do them. Google must be sanctioned to deter blatant
 6 violations of Court orders as a calculated litigation strategy.

7 **IV. Plaintiffs’ Requested Relief Is Warranted.**

8 **Exclusion of Sramek and Harren:** Google’s contention that Messrs. Sramek and Harren
 9 were only recently assigned to investigate Incognito-detection bits is belied by the recently
 10 produced e-mail. Google “fail[ed] to identify” them, “undermin[ing] Plaintiffs’ ability to obtain
 11 full discovery....” Dkt. 588 at 45. Exclusion is therefore automatic under Rules 26 and 37(c).

12 **Preclusion Under Rule 37(b):** Google’s *refusal* to investigate other Incognito-detection
 13 bits and log sources—all while continuing to present its untested say-so about what it supposedly
 14 does (and does not) do with such data—confirms the necessity of this relief. Google should not be
 15 permitted to say it “does not” do certain things with Incognito data when it refuses, in violation of
 16 multiple Court orders, to complete the investigations required to make such an assertion.

17 **Jury Instructions Under Rules 37(b) and 37(e):** Google only contests that jury
 18 instructions are warranted under Rule 37(e), not 37(b). Opp. 8. Rule 37(e) is also satisfied because
 19 Google has evinced an “intent to deprive [Plaintiffs] of the [Incognito-detection bits purposes] in
 20 the litigation.” *Best Label Co. v. Custom Label & Decal, LLC*, 2022 WL 1525301, at *2 (N.D. Cal.
 21 May 13, 2022). At this point, Google’s misconduct goes beyond “gross negligence.” *Meta*
 22 *Platforms, Inc. v. BrandTotal Ltd.*, 2022 WL 1990225, at *6 (N.D. Cal. June 6, 2022). Given
 23 Google’s admission regarding its failure to investigate *other* bits and log sources apart from the
 24 logs, the proposed jury instructions are indisputably warranted.

25 **Additional Monetary Sanctions:** Google does not dispute the Court may award additional
 26 monetary sanctions and its brazen submission confirms they are warranted.

27 Plaintiffs request a hearing and that Mr. Sramek, Mr. Harren, and Senior Litigation Counsel appear.
 28

1 Dated: August 25, 2022

Respectfully submitted,

2 By: /s/Mark C. Mao

3 Mark C. Mao (CA Bar No. 236165)
4 mmao@bsfllp.com
5 Beko Reblitz-Richardson (CA Bar No. 238027)
6 brichardson@bsfllp.com
7 Erika Nyborg-Burch (CA Bar No. 342125)
8 Enyborg-burch@bsfllp.com
9 BOIES SCHILLER FLEXNER LLP
44 Montgomery Street, 41st Floor
San Francisco, CA 94104
Telephone: (415) 293 6858
Facsimile (415) 999 9695

10 David Boies (*pro hac vice*)
11 dboies@bsfllp.com
12 BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
13 Telephone: (914) 749-8200

14 James W. Lee (*pro hac vice*)
15 jlee@bsfllp.com
16 Rossana Baeza (*pro hac vice*)
rbaeza@bsfllp.com
17 BOIES SCHILLER FLEXNER LLP
100 SE 2nd Street, Suite 2800
18 Miami, FL 33130
Telephone: (305) 539-8400
Facsimile: (305) 539-1304

19 Alison L. Anderson (CA Bar No. 275334)
20 alanderson@bsfllp.com
21 BOIES SCHILLER FLEXNER LLP
725 S Figueroa St., 31st Floor
22 Los Angeles, CA 90017
Telephone: (213) 995-5720
Facsimile: (213) 629-9022

23 William Christopher Carmody (*pro hac vice*)
24 bcarmody@susmangodfrey.com
25 Shawn J. Rabin (*pro hac vice*)
srabin@susmangodfrey.com
26 Steven Shepard (*pro hac vice*)
sshepard@susmangodfrey.com
27 Alexander P. Frawley (*pro hac vice*)
afrawley@susmangodfrey.com
28 SUSMAN GODFREY L.L.P.

1 1301 Avenue of the Americas, 32nd Floor
2 New York, NY 10019
3 Telephone: (212) 336-8330

4 Amanda Bonn (CA Bar No. 270891)
5 abonn@susmangodfrey.com
6 SUSMAN GODFREY L.L.P.
7 1900 Avenue of the Stars, Suite 1400
8 Los Angeles, CA 90067
9 Telephone: (310) 789-3100

10 John A. Yanchunis (*pro hac vice*)
11 jyanchunis@forthepeople.com
12 Ryan J. McGee (*pro hac vice*)
13 rmcgee@forthepeople.com
14 MORGAN & MORGAN, P.A.
15 201 N Franklin Street, 7th Floor
16 Tampa, FL 33602
17 Telephone: (813) 223-5505
18 Facsimile: (813) 222-4736

19 Michael F. Ram, CA Bar No. 104805
20 MORGAN & MORGAN
21 711 Van Ness Ave, Suite 500
22 San Francisco, CA 94102
23 Tel: (415) 358-6913
24 mram@forthepeople.com

25 *Attorneys for Plaintiffs*
26
27
28